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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, ~~1929~~ 1930

No. ~~554~~ 23

CHARLES H. STANGE, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JANUARY 3, 1930

CERTIORARI GRANTED MARCH 3, 1930

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SUPREME COURT OF THE UNITED STATES

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[fol. 1]

SUPREME COURT OF THE UNITED STATES

No. 554

CHARLES H. STANGE, Petitioner,

v.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner, Charles H. Stange, Merrill, Wisconsin, presents this, his petition for a writ of certiorari to review the judgment of the Court of Claims, rendered on November 4, 1929, dismissing the petition of petitioner, in the action of this petitioner against the United States, No. F-261 of the records of the Court of Claims.

[fol. 2] In this action petitioner seeks the recovery or refunding of income taxes for 1914, assessed by the Commissioner of Internal Revenue against him in 1924, and collected from him in 1925. The Court below made special findings of fact and thereon stated its conclusions of law. Except certain inferences or conclusions from basic facts admitted by both parties to be true, the findings of fact so made are accepted by petitioner.

Accompanying this petition is a certified transcript of the record below, consisting of the pleadings, findings of fact, judgment and opinion of the Court, but not the evidence.

(The italics of this petition, unless otherwise indicated, are ours.)

Summary of Matters Involved

In 1914, A. H. Stange, father of petitioner and a majority stockholder in the A. H. Stange Company (herein referred to as "the Stange Company,") a timber owning lumber manufacturing company, readjusted the ownership

of his stock in that company and his indirect interest in [fol. 3] its assets, by gifts to his children and his sons-in-law. Immediately before this adjustment was made Mr. Stange owned 1780 of the 2500 shares of stock of the Stange Company; after it was made he owned 358 shares, only, the ownership of the remainder of his shares having passed by gift to members of his family (III Findings of Fact).

As a part of this readjustment petitioner received as a gift from his father 237 shares of stock in the Stange Company. As he was previously the owner of 120 shares, his holdings were 357 shares after the readjustment was made, or one-seventh of the total number of shares outstanding (II and III Findings of Fact).

In carrying out his plan of readjustment, Mr. Stange organized two companies (the Union Land Company and the Kinzel Lumber Company, herein referred to as "the new companies,") III Findings of Fact, and caused to be conveyed to them by the Stange Company certain timbered and cut-over lands and other assets theretofore owned by that company. The cost of these assets to the Stange [fol. 4] Company was $619,667.15. Their value on its books of account (inclusive of $800,000 appreciation) was $1,419,667.15 (V Findings of Fact). Upon the conveyance to them of these assets, the new companies raised credits on their books of account in favor of the stockholders of the Stange Company approximately for the total amount for which the assets so received from the Stange Company were entered on their books, $3,796,382.61. This amount, it will be seen, included a large amount of unrealized appreciation. Petitioner's book credits raised by the two companies aggregated $542,000 (IX Findings of Fact).

Petitioner's credits, as well as the credits of the other stockholders, were extinguished by debits to their accounts, for stock and debentures issued to them by the two new companies and for a comparatively small amount of cash paid to them. These debits to petitioner's account equalled the amount of the credits, $542,000 (IX Findings of Fact).

All of the steps to which we have referred were taken, in 1914, in the order stated.

Petitioner's income tax return for 1914 was filed in February, 1915. In November, 1922, long after the bar of the [fol. 5] statute of limitations had become effective, peti-

tioner signed and delivered to the Commissioner of Internal Revenue a waiver of "any and all statutory limitations as to the time within which assessments" might be made against him for 1914 (XI Findings of Fact). No waiver of the statute relating to the period for making collection was ever given by petitioner.

There were no earnings accrued since March 1, 1913, of the Stange Company, available for distribution in 1914. The earnings (gains or profits) of that company accrued prior to March 1, 1913, available for distribution in 1914, were $982,227.93, *which is the entire amount of its accumulated surplus immediately before the conveyance of assets was made by it to the two new companies, after excluding unrealized appreciation of timbered lands* (VI Findings of Fact). The two new companies had no earnings whatsoever available for distribution in 1914. Nevertheless, the Commissioner of Internal Revenue ruled that the transfer of assets by the Stange Company to the new companies, the raising of credits on their books, and the issuance by them in satisfaction thereof of stock and de-
[fol. 6] bentures gave rise to taxable dividends in the aggregate amount of $4,494,968.81, of which $642,138.40, or one-seventh, was ruled to be taxable to petitioner (XII Findings of Fact). This amount was $100,138.40 more than the credits raised by the two new companies in favor of petitioner at the time the assets were conveyed to them by the Stange Company. This determination of petitioner's 1914 tax liability so made by the Commissioner of Internal Revenue was approved by the Court of Claims, in its entirety.

The details of the foregoing steps taken by or at the direction of Mr. A. H. Stange and all figures involved in the case appear in the special findings of fact made by the Court below to which reference is now made.

Upon the hearing of this action in the Court below, petitioner contended that:

1. The present case falls within the principle of the decision of this Court in Lynch v. Turrish, 247 U. S. 221, rather than that of Lynch v. Hornby, 247 U. S. 339. There is, therefore, *no taxable element* in the present case.

[fol. 7] If, however, it be held that the transaction, consisting of the several steps taken by or at the direction of Mr.

A. H. Stange, is a taxable one, it was urged that the amount of income taxable to all stockholders of the Stange Company *may not exceed the amount of the accumulated realized profits* of that company. As stated in the VI Finding of Facts, this amount was $982,227.93, exclusive of unrealized appreciation. The maximum amount taxable to petitioner, upon the application of this principle, would be one-seventh of this amount or $140,318.27.

2. The power *to assess* the alleged deficiency for 1914 expired long prior to February, 1924, when the additional assessment was made. This power could not be and was not revived by the waiver signed by plaintiff and the Commissioner of Internal Revenue in November, 1922, after the bar of the statute had fallen.

No collection waiver was ever given by petitioner. The power *to collect* the alleged deficiency expired long prior to March 19, 1925, the date on which collection was enforced. No liability existed at that time.

3. The several steps taken by Mr. A. H. Stange and the [fol. 8] corporations controlled by him (A. H. Stange Company, Union Land Company, and Kinzel Lumber Company) constitute one transaction, which is *non-taxable gift* from father to son. When so considered, the credits raised by the two new companies on their books in favor of petitioner are non-taxable to the extent of 237/357ths thereof. Nevertheless, the Commissioner held that the amount of the credits was a taxable dividend to the extent of 100% thereof.

4. The Commissioner of Internal Revenue *overstated the amount taxable* to petitioner, even though the transaction be regarded as taxable in its entirety.

In its decision in this case the Court of Claims denied each of the contentions so advanced before it by petitioner. In so doing, the Court below erred as to each contention; and petitioner now submits the foregoing statement of his contentions and the action of the Court thereon as his assignment of errors for purposes of this petition.

Reasons Relied on for the Allowance of the Writ of Certiorari

The reasons for the granting of this application, relied on by petitioner, are these:

(a) The decision of the Court of Claims now sought to be reviewed on the validity of the assessment waiver given [fol. 9] after the bar of the statute of limitations had become effective, is in direct conflict with the decision of the D. C. Court of Appeals in the Joy Floral Company case, 29 Fed. (2d) 865. In fact, this conflict is expressly recognized in the last paragraph but one of the decision of the Court of Claims in the present case. These two Courts are immediately subordinate to this Court. The Court of Appeals of the District of Columbia has, in certain cases, concurrent jurisdiction with the several Circuit Courts of Appeal, of appeals in tax cases from decisions of the Board of Tax appeals. (Section 1002 of the Revenue Act of 1926.)

(b) The decision of the Court below that the assessment waiver served to confer upon the Commissioner of Internal Revenue not only the power *to assess* but also the power *to collect* is in conflict with the underlying principle of decisions of this Court in the New York & Albany Lighterage Company case (273 U. S. 346), and the Benjamin Russell case (278 U. S. 181), and numerous decisions of the Board of Tax Appeals, such as those rendered in the cases of American Powder Mills, 12 B. T. A. 305 and Chicago Insulated Wire and Manufacturing Company, 10 B. T. A. 1195.

[fol. 10] (c) The ruling of the lower Court that as a result of the steps outlined in the findings of fact petitioner received a taxable dividend in the amount of $642,138.40, is in conflict with the decisions of this Court in Mobile and Ohio Railroad Company v. Tennessee, 153 U. S. 486 and Lynch v. Turrish, 247 U. S. 221, and with the implication of the decisions of this Court in the Lynch-Hornby case, 247 U. S. 339, the Phellis case, 257 U. S. 156, and the Rockefeller case, 257 U. S. 176. Each of these cases, except the Mobile and Ohio case, arose under the Revenue Act of 1913.

(d) The present case involves questions of general public interest. Thousands of waivers have been given by taxpayers. These waivers differ in the language they contain. Many of them relate to assessment, only. Some were given before and others after the expiration of the statutory periods. A conflict of authority regarding the validity and effect of these waivers has been created by the decision of the Court of Claims in petitioner's case. The Court of Claims is a court of first instance and its judgments are reviewed only by this court.

[fol. 11] Uncertainty now exists in the minds of taxpayers and officials regarding the rules to be applied in determining the validity or invalidity of waivers. That such uncertainty extends to the Congress of the United States is inferable from the enactment of Section 506 of the Revenue Act of 1928. In fact, that section undoubtedly contemplates that an authoritative ruling shall be made by the Courts on the question of the validity of waivers given after the expiration of the statutory period of limitation. We respectfully suggest that, as conflict in the decisions of the Courts immediately subordinate to this Court, on this question, now exists, only by a decision of this Court of the question may an authoritative ruling be secured.

The premises considered, we respectfully ask for the issuance of a writ of certiorari to review the judgment of the Court of Claims in petitioner's case, and the entry of such orders as may be incidental to that relief.

W. W. Spalding, Counsel for Petitioner, Tower Building, Washington, D. C. Mason, Spalding & McAtee, of counsel.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. F-261

CHARLES H. STANGE,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

On August 16, 1926, the plaintiff filed his original petition.

Subsequently, to wit, on May 11, 1928, the plaintiff, by leave of court, filed his amended petition.

Said amended petition is as follows:

II. Amended Petition—Filed May 11, 1928

The plaintiff, Charles H. Stange, by his attorney, W. W. Spalding, by this, his amended petition herein, respectfully shows:

1. That at all times hereinafter mentioned plaintiff was and is a citizen of the United States and a resident of Merrill, Lincoln County, State of Wisconsin.

2. The plaintiff has a just claim for the recovery of $30,779.76 paid by plaintiff to the Collector of Internal Revenue for the District of Wisconsin, at Milwaukee, Wis- [fol. 2] consin, under protest, on March 19, 1925, as an additional assessment of income taxes determined, assessed, and collected, with interest, by the Commissioner of Internal Revenue of the United States against and from plaintiff for the calendar year ending December 31, 1914. Plaintiff further claims interest at 6 per cent per annum on the said amount of $30,779.76 from March 19, 1925, the date on which payment was made. The provisions of law under which said taxes are alleged to have been assessed, and under which the petitioner claims such refund, are Section, 2, paragraphs A, B, G, and L of the Act approved October 3, 1913 (38 Stat. L., 172), entitled "An Act to Reduce Tariff Duties and to Provide Revenue for the Government and for Other Purposes," and herein referred to as the Revenue Act of 1913.

3. Pursuant to Subdivision A-2 of the Revenue Act of 1913, plaintiff, on or about March 15, 1915, on official form 1040, made to the Commissioner of Internal Revenue his return of net income for the calendar year ending December 31, 1914, for taxes imposed by Subdivisions A-1 and A-2 of the Revenue Act of 1913. In said return plaintiff reported his net taxable income for the calendar year ending December 31, 1914, as $824.08, and the taxes assessable thereon as $8.24, which taxes plaintiff paid thereafter, in 1915, when due.

4. On March 24, 1914, A. H. Stange, then principal owner of the stock of the A. H. Stange Company, of Merrill, Wisconsin, organized the Union Land Company under the laws of Wisconsin. Similarly on May 29, 1914, said A. H. Stange [fol. 3] organized the Kinzel Lumber Company under the

laws of Wisconsin. On May 29, 1914, the said A. H. Stange divided, by gift, his shares of the capital stock of said A. H. Stange Company as follows: He, said A. H. Stange, reapportioned said shares among the members of his family and himself so that, after the reapportionment was complete, one-seventh of the total number of shares outstanding was owned by each of the sons and daughters of said A. H. Stange and one-seventh thereof by himself (said A. H. Stange), except that part of the shares assigned to several of the daughters were in fact transferred to their respective husbands. After such reapportionment was made, to wit, after May 29, 1914, plaintiff held and owned 357 shares of the capital stock of said A. H. Stange Company. The recipients of the stock of said A. H. Stange Company, just named, thereupon subscribed for the capital stock of the Union Land Company and the Kinzel Lumber Company in the same proportions, which stock of the Kinzel Lumber Company was issued on June 1, 1914, and which stock of the Union Land Company was issued on June 2, 1914, in the following amounts: By the Union Land Company stock having a par value of $245,000, and by the Kinzel Lumber Company stock having a par value of $105,000. To the plaintiff was issued stock of the Union Land Company, having a par value of $35,000, and stock of the Kinzel Lumber Company, having a par value of $15.000 total par value of the stock of the two companies $50,000.

5. On May 29, 1914, when the stock of the A. H. Stange Company was so reapportioned by A. H. Stange to himself [fol. 4] and members of his family, the A. H. Stange Company had a surplus of $4,852,529.59, of which $824,189.93 only was earned surplus, and the remainder represented appreciation of timber and timber lands accrued before and existing at March 1, 1913. The status of the surplus of said A. H. Stange Company at June 10, 1914, was the same. The appreciation in the surplus figures is based on the value of the timber at March 1, 1913, determined by the engineers of the Bureau of Internal Revenue. There was no diminution of such value between March 1, 1913, and any date in 1914 or thereafter. After the plaintiff acquired his stock in the A. H. Stange Company, as aforesaid, the said A. H. Stange Company, in partial liquidation of its assets, conveyed a large portion of such assets to the said Union Land

Company and the said Kinzel Lumber Company. This conveyance was made on June 10, 1914, by the A. H. Stange Company directly to the Union Land Company and the Kinzel Lumber Company, without any title or ownership having passed to plaintiff and/or other stockholders of any of the companies named.

6. On July 1, 1914, the said Union Land Company issued to plaintiff and its other stockholders, in proportion to their stockholdings, debenture notes in the amount of $3,185,000; and on the same day the said Kinzel Lumber Company issued to plaintiff and its other stockholders, also in proportion to their stockholdings, debenture notes in the amount of $140,000. Of such notes so issued by the two companies plaintiff received notes having a face value of $475,000, this [fol. 5] amount being one-seventh thereof. To this amount the Commisioner of Internal Revenue added $167,138.40, to represent the value of the stock of the two companies, Union Land Company and the Kinzel Lumber Company, acquired by plaintiff, as above stated, and ruled that the sum of these two amounts, aggregating $642,138.40, constituted taxable income to plaintiff for 1914, under Subdivision B of the Revenue Act of 1913. In so holding, the Commissioner of Internal Revenue erred, because:

(a) Said distributions by the Union Land Company and the Kinzel Lumber Company represented a liquidation, not of earnings or profits, but of their respective paid-in surpluses, based on the value of said assets conveyed to these companies by the A. H. Stange Company, as above stated, at the date of such conveyances, to wit, June 10, 1914.

Immediately prior to the issuance of said debentures, the paid-in surplus resulting from such conveyances were: Of the Union Land Company, $3,909,968.81; and of the Kinzel Lumber Company, $130,000. Neither of these companies then had any earned surplus or undivided profits whatsoever. These paid-in surplus figures are based on the value of the tangible assets at March 1, 1913, determined by the engineers of the Bureau of Internal Revenue. There was no diminution of such value between March 1, 1913, and any date in 1914 or thereafter.

(b) Said debentures did not represent in whole or in part earnings of the issuing companies, or either of them, made

[fol. 6] after February 28, 1913; and the debentures received by plaintiff were less in par value and in actual value than the plaintiff's capital interest in the shares of stock owned by him, immediately prior to their issuance and at all times after said conveyances had been made to the issuing companies by the A. H. Stange Company, as aforesaid.

(c) Said debentures were based wholly on said assets conveyed to the issuing companies by the A. H. Stange Company, as above stated, the value of which, except to the extent of $824,189.93 (the earned surplus of the A. H. Stange Company), represented appreciation of land and timber accrued before and existing at March 1, 1913.

(d) Said distributions did not result in the receipt by plaintiff of income taxable under the Revenue Act of 1913. Whatever value inhered at any time in the stock of the Kinzel Lumber Company and Union Land Company, received by plaintiff as aforesaid, represented a gift to plaintiff from his father, A. H. Stange; and whatever value inhered at any time in said debenture notes, received by plaintiff as aforesaid, represented also a gift to plaintiff from his father, A. H. Stange. Neither of such values constituted taxable income when received.

7. On November 10, 1922, plaintiff signed and gave to the Collector of Internal Revenue a Waiver of the statute of limitations relating to the period in which assessments might be made for 1914. On January 21, 1924, plaintiff was [fol. 7] notified by the Commissioner of Internal Revenue that an additional assessment of income taxes for 1914 in the amount of $28,992.55, based on the erroneous ruling set forth in the next preceding paragraph hereof, would be made; and such additional assessment was in fact made on or about February 23, 1924. The plaintiff, on or about March 1, 1924, duly filed with said collector for presentation to said Commissioner, on official Form 47, a claim for the abatement of said additional assessment, but said Commissioner rejected said claim for abatement and so notified the plaintiff on or about November 20, 1924.

8. Subsequent to the rejection of said claim for abatement, to wit, on March 11, 1925, said Collector of Internal Revenue made a second demand for the payment of said additional assessment for 1914 and interest, aggregating

$30,779.76, viz $28,992.55, the additional assessment for 1914, and $1,787.21 interest thereon.

9. The plaintiff was then compelled to pay, and did pay, on March 19, 1925, to said Collector of Internal Revenue, the said additional assessment plus interest, the total additional payment being $30,779.76. Said additional payment was made under threat by said collector to seize and sell the plaintiff's property if he failed to make such payment and in the belief that such threats would be carried out. At the same time said payment was so made, plaintiff filed with the said Collector of Internal Revenue a written protest, to the effect that said payment was not legally due from plaintiff, and that said additional assess-
[fol. 8] ment had been erroneously, illegally, and wrongfully made.

10. On information and belief, the plaintiff avers that his taxes so paid by plaintiff to the said Collector of Internal Revenue were thereafter by him turned over and deposited in the Treasury of the United States in the usual course of his official business.

11. On March 29, 1926, plaintiff duly filed with the Collector of Internal Revenue, for transmission to the Commissioner of Internal Revenue, a claim for refund of $30,779.76, with interest, which claim was based on the payment of such additional assessment for 1914, and the erroneous finding of the Commissioner of Internal Revenue that plaintiff received taxable income in the amount of $642,138.40 in the form of stock and debentures of the Union Land Company and the Kinzel Lumber Company, the two Wisconsin corporations.

12. On May 12, 1926, the plaintiff's said claim for refund was rejected and denied by the Commissioner of Internal Revenue, and the sum of $30,779.76 is now wrongfully and unlawfully retained and withheld from the plaintiff without his consent and against his will by the United States.

13. Plaintiff's original petition was duly and properly verified by the plaintiff on the 30th day of July, 1926.

14. That, since the filing of said original petition, new matters have arisen which give to plaintiff additional

[fol. 9] grounds and reasons for claiming a refund of the taxes paid to wit, the statute of limitations.

15. Not waiving the grounds for refund, as alleged in the original petition, but relying thereon, plaintiff claims the refund of said taxes on the following further grounds:

16. That said amounts of $28,992.55 and interest of $1,787.21 are alleged to be a deficiency in tax and interest thereon for the calendar year 1914. That said alleged deficiency in tax for the year 1914 was not discovered or assessed by the Commissioner of Internal Revenue within three years or five years after the return was filed. That shortly before the 8th day of November, 1922, to wit, earlier in 1922, the Commissioner of Internal Revenue made the erroneous determination that an alleged deficiency in tax was due from the petitioner for the calendar year 1914; and notwithstanding no assessment had been made thereof, and notwithstanding the time for making any assessment or instituting proceedings by distraint or action in court to collect the same had expired, the Commissioner requested the plaintiff to sign, and plaintiff did sign, a paper writing which purports to waive any and all statutory limitations as to the time within which assessments based upon income tax liabilities for the years 1914 and 1917, determined under the Revenue Act of 1913, the Revenue Act of 1916 as amended by the Revenue Act of 1917, might be entered. An exact copy of said paper writing of November 14, 1922, is attached hereto and marked "Exhibit A" for identification.

[fol. 10] 17. That said paper writing of November 14, 1922, Exhibit A, is designated by the Commissioner of Internal Revenue as an "unlimited waiver," and there was included in said writing the years 1914 and 1917. That on or about April 11, 1923, the Commissioner of Internal Revenue promulgated a ruling, known as IT-4-822, Mim. 3085, published in Cumulative Bulletin of Internal Revenue Rulings, II-1, page 174, which reads as follows:

"To collectors of internal revenue, internal revenue agents in charge, and others concerned:

"The form of waiver now in use extends the time in which assessments of 1917 income and excess-profits taxes may be made to one year from the date of signing by the

taxpayer. Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1st, 1924.

(Signed) D. H. Blair, Commissioner."

18. That, in accordance with the ruling of the Commissioner, the said paper writing of November 14, 1922, which purports to be an unlimited waiver, expired on April 1, 1924. That prior to the execution of said paper writing of November 14, 1922, the time within which any assessment and/or proceeding by distraint or otherwise could be made or instituted for the collection of alleged additional income taxes for the year 1914 had expired, under the provisions [fol. 11] of Section 250 (d) of the Revenue Act of 1921, and therefore said writing was unavailing for any purpose. But, if it can be said that said paper writing of November 14, 1922. revived the right to enforce collection of an additional assessment for 1914 (which plaintiff denies), no proceeding or step for the collection of said additional assessment was initiated or taken within the period of the reviver so fixed by Mim. 3085, supra; and, inasmuch as said waiver expired on April 1, 1924, and has never been revived or extended, no authority for enforcing collection of said additional assessment existed on March 19, 1925. Said paper writing, also, by its terms, was limited to an extension of the assessable period. It did not extend the period for enforcing collection of the additional assessment made against plaintiff, as aforesaid, for 1914. Therefore, long before proceedings were initiated against petitioner, as stated in paragraphs 8 and 9 hereof, the right to make or enforce collection of said additional assessment for 1914 was extinguished by the statute of limitations. Collection, however, was enforced by the Collector of Internal Revenue; and, therefore, plaintiff now seeks the recovery of the amount so unlawfully exacted and collected of him, viz, $30,779.76, with interest.

19. That on or about the 25th day of June, 1927, and within four years after the collection and payment of said taxes and interest, as aforesaid, the plaintiff filed with the Collector of Internal Revenue for the District of Wisconsin, at Milwaukee, an amended and supplemental claim for the

[fol. 12] refund of said taxes and interest, in which claim plaintiff alleged as follows:

"On or before March 15, 1915, claimant duly filed his income tax return for the calendar year 1914 with the Collector of Internal Revenue. In February, 1924, an alleged deficiency of income taxes for 1914, in the amount of $28,992.55, was assessed against claimant by the Commissioner of Internal Revenue. On March 11, 1925, more than five years after the filing of the return, collection proceedings, to enforce collection from claimant of said alleged deficiency, with interest, were initiated and prosecuted by the official representatives of the Bureau of Internal Revenue. In obedience to such collection proceedings and to avoid distraint proceedings and the steps to be taken thereunder, including the summary seizure and sale of his property, on March 19, 1925, claimant paid under protest said alleged deficiency of $28,992.55, with interest of $1,787.21, total, $30,779.76. Long prior to the initiation of said collection proceedings, the tax liability represented by said alleged deficiency assessment for 1914 and all interest thereon had been extinguished by the bar of the statute of limitations; and at the time collection was so enforced by said proceedings such liability did not exist. Nevertheless, claimant was compelled to make payment of said alleged deficiency, with interest, on March 19, 1925, to avoid distraint proceedings and the aforesaid steps thereunder, following collection proceedings initiated by the Bureau of Internal Revenue more than five years after the filing of the said return for 1914. Collection proceedings and actual collection were [fol. 13] therefore unwarranted.

"Said alleged deficiency assessment of February, 1924, for the calendar year 1914, was made under a waiver of the limitation period for making additional assessments, signed and given by claimant in November, 1922. Upon information and belief, claimant asserts that such waiver was invalid and conferred no rights upon the Commissioner of Internal Revenue to make the said alleged deficiency assessment for this reason, among others: The right to make said alleged deficiency assessment was barred and extinguished by the statute of limitations prior to the time the waiver was given, and such right being then so barred and

extinguished, could not be revived by a waiver or even an agreement of the parties in interest.

"For these reasons claimant asks for the refunding to him of the amount so collected, $30,779.76, with interest."

20. That more than six months has expired since the filing of said amended and supplemental claim for refund, and no decision has been rendered thereon by the Commissioner of Internal Revenue. That plaintiff has exhausted his remedies before the Treasury Department, Bureau of Internal Revenue, for the refund of the amount of said additional assessment, and now comes into this Honorable Court and sues the United States for the amount unlawfully exacted of him. That the collection from plaintiff, on March 19, 1925, of said amount of $28,992.55, as alleged taxes for the calendar year 1914, and interest of $1,787.21, was erroneous and illegal, and, under the provisions of [fol. 14] Sections 3220 and 3226 of the Revised Statutes, as amended, should be refunded to plaintiff.

21. Plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against such government, and is and always has been the sole and absolute owner of the claim here presented, and has made no transfer or assignment of said claim or of any part thereof or of any interest therein, and is justly entitled to the amount claimed from the United States, after allowing all just credits and set-offs, and no other action than as aforesaid has been had on this claim in Congress or by any of the departments.

22. The plaintiff believes the facts as hereinabove stated to be true.

Wherefore plaintiff prays judgment against the United States of America, upon the facts and law, for $30,779.76, with interest at the rate of 6 per cent per annum from March 19, 1925, until paid, and for all other proper relief.

Charles H. Stange, W. W. Spalding, R. A. Littleton, Attorneys for Plaintiff, Woodward Building, Washington, D. C.

[fol. 15] *Duly sworn to by Charles H. Stange. Jurat omittel in printing.*

[fol. 16] EXHIBIT "A" TO AMENDED PETITION

Waiver

Mr. C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the Act of Congress, approved October 3, 1913, and also by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

(Signed) C. H. Stange.

Merrill, Wis., Nov. 10, 1922.
Approved March 16, 1923.
D. H. Blair, Commissioner of Internal Revenue.

[fol. 17] III. GENERAL TRAVERSE—Filed June 20, 1928.

And now comes the Attorney General, on behalf of the United States, and answering the amended petition herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

IV. ARGUMENT AND SUBMISSION

On May 9, 1919, this case was argued and submitted on merits by Mr. W. W. Spalding, for the plaintiff, and by Mr. J. H. Sheppard, for the defendant.

[fol. 18] V. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Green, J.**—Filed November 4, 1929

This case having been heard by the Court of Claims, the Court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

I

On February 19, 1915, plaintiff made a return of taxable income in the amount of $824.08 for the calendar year 1914 for taxes imposed by the revenue act of 1913, and thereon paid income taxes of $8.24.

II

In the early part of 1914, and prior to March 24, 1914, plaintiff's father, A. H. Stange, a citizen and resident of Merrill, Wisconsin, decided to divide the greater part of his property with his two sons and his four daughters and their husbands. He was at said time the owner of 1,780 of the 2,500 shares of the outstanding stock of the A. H. Stange Company, a corporation.

The organization of the Union Land Company and the Kinzel Lumber Company by Mr. Stange in 1914, the transfer of assets to these companies by the A. H. Stange Company and the issuance by the Union Land Company and the Kinzel Lumber Company of stock and debentures to their stockholders, including plaintiff, as set forth in these findings, were in accordance with directions given by A. H. Stange and by mutual consent of all parties concerned.

III

In accordance with the plans so formulated by A. H. Stange, on March 24, 1914, he organized the corporation, Union Land Company, under the laws of the State of Wisconsin. On May 29, 1914, he organized the corporation Kinzel Lumber Company, under the laws of the same State.

On this last named date, May 29, 1914, the capital stock of the A. H. Stange Company, consisting of 2,500 shares of the par value of $100 each, was reapportioned by A. H. Stange between himself and his children in such manner as to give to himself and each of his sons and daugthers (and/or daughters and sons-in-law) one-seventh of such total of 2,500 shares. Such reapportionment represented gifts by A. H. Stange to his sons, daughters, and sons-in-law, in the proportions hereafter stated.

[fol. 19] The ownership of the capital stock of the A. H. Stange Company immediately prior and subsequent to this reapportionment was as follows:

Stockholders in A. H. Stange Company

	Before May 29, 1914	After May 29, 1914
A. H. Stange, father	1,780	358
C. H. Stange, son (plaintiff)	120	357
Aug. J. Stange, son	120	357
Chas. H. Kinzel, son-in-law	120	178
Mrs. C. H. Kinzel, daughter	....	179
E. W. Ellis, son-in-law	120	178
Mrs. E. W. Ellis, daughter	....	179
Fred W. King, son-in-law	10	10
Mrs. F. W. King, daughter	110	347
Mrs. R. M. Rogers, daughter	120	357
Total	2,500	2,500

The 120 shares of stock owned by plaintiff prior to such reapportionment were acquired by him by gift from his father, A. H. Stange, 1 share in 1897 and 119 shares in 1902.

On May 29, 1914, the stockholders of the A. H. Stange Company subscribed for the capital stock of the Union Land Company and the Kinzel Lumber Company in the same proportions as they owned stock in the A. H. Stange Company immediately after the reapportionment. The stock of the Kinzel Lumber Company was issued on June 1, 1914, and that of the Union Land Company on June 2, 1914, in the following amounts: By the Union Land Company, stock having a total par value of $245,000; and by

the Kinzel Lumber Company, stock having a total par value of $105,000. To plaintiff was issued stock of the Union Land Company having a par value of $35,000 and stock of the Kinzel Lumber Company having a par value of $15,000, being one-seventh of the issued stock of each company, the total par value of the stock of the two companies thus issued to plaintiff being 50,000. All of the certificates of stock so issued by both the Union Land Company and the Kinzel Lumber Company to plaintiff and the other stockholders of these corporations contained a provision that the stock could not be sold without first being offered for sale at par to the corporations, respectively, issuing same.

IV

The following appears in the minutes of a special meeting of the directors of the A. H. Stange Company held at Merrill, Wisconsin, on June 1, 1914:

"To carry into execution the plan for a long time under consideration to discontinue A. H. Stange Co. holdings of cut-over and timbered lands as well as its logging operations, it was moved, seconded, and unanimously carried—

"1. That the following accounts as they will appear on the books of this company as of June 10, 1914, be closed, to wit:

"Pine lands.
"Lincoln County lands.
"General log equipment.
"Camp Pellegrin.
"Camp No. 2.

[fol. 20] "2. That the values, set up opposite the said accounts as they will appear on June 10, 1914, together with the sum of $60,000.00 in cash, be charged against surplus account.

"3. That the officers of this company be and they are hereby authorized to give by proper deeds of conveyance to Union Land Co. (a corporation of Merrill, Wis., composed exclusively of the stockholders of A. H. Stange Co., the respective interests of the stockholders in Union Land

Company being equal to their present pro rata holdings in A. H. Stange Co.) all real estate and personal property represented by the above-named accounts together with the sum of $60,000.00 in cash.

"4. That on June 10, 1914, the sum of $300,000.00 be charged against surplus account and cash or its equivalent be given to Kinzel Lbr. Co., a corporation of Merrill, Wisconsin (comprised of the stockholders of A. H. Stange Co., the interests of the stockholders in both corporations being proratably equal)."

V

Thereafter, to wit, on June 10, 1914, the A. H. Stange Company transferred to the Union Land Company cash in the amount of $60,000 and other property consisting of logging equipment and railroads, cut-over lands, and timberlands having a book value of $1,059,667.15, a total of $1,119,667.15. On the same date, June 10, 1914, the A. H. Stange Company also transferred to the Kinzel Lumber Company cash and notes receivable in the amount of $300,000, and one parcel of real estate not carried on the books of the A. H. Stange Company but having a value of $5,000.

Prior to such transfers by the A. H. Stange Company to the Union Land Company and the Kinzel Lumber Company said A. H. Stange Company was engaged in the manufacture of lumber and other wood products from its own timber. In connection with such operations it owned, prior to said transfers, logging railroads and equipment and conducted logging operations in the timber it owned. By said transfers to the Union Land Company and the Kinzel Lumber Company the A. H. Stange Company divested itself of all its logging equipment, railroads, cut-over lands and timberlands, and thereafter confined itself to manufacturing operations from timber purchased from others.

VI

The records and books of account of the A. H. Stange Company reflect the following facts:

Surplus, March 1, 1913	$1,842,872.70
Dividend distribution, July 19, 1913	37,500.00
Dividend distribution, Aug. 12, 1913	25,000.00
Net earnings, 1913	28,855.23
Surplus, December 31, 1913	1,807,227.93
Dividend distribution, Jan. 19, 1914	25,000.00
Surplus, June 10, 1914, before transfers	1,782,227.93
Surplus, June 10, 1914, after transfers	362,560.78
Net operating loss, 1914	91,718.64
Surplus, December 31, 1914	270,842.14

[fols. 21 & 22] The debits to the surplus account of June 10, 1914, to represent the said transfer of assets by the A. H. Stange Company to the Union Land Company and the Kinzel Lumber Company were as follows:

For assets transferred to:	
Union Land Company	$1,119,667.15
Kinzel Lumber Company	300,000.00
	1,419,667.15

The income-tax return of the A. H. Stange Company for 1914 showed a net operating loss of the amount above stated, $91,718.64.

Included in each of the above surplus figures, as of March 1, 1913, December 31, 1913, June 10, 1914, and December 31, 1914, was $800,000 of appreciation. On June 30, 1906, the book account entitled "pine lands" was debited with $800,000, and the same amount was credited to the surplus account, to represent appreciation of the company's pine lands from date of acquisition (which went back as to some of the lands to 1895) to the date of the entry. Excluding such appreciation, the surplus account of the A. H. Stange Company showed credit balances on the several dates antecedent to the transfers, as follows:

March 1, 1913	$1,042,872.70
December 31, 1913	1,007,227.93
June 10, 1914, before transfers	982,227.93

The net cost to March 1, 1913, of the lands and timber of the A. H. Stange Company owned on that date was $356,-

397.30. The book value on that date, which included the appreciation item of $800,000 was $1,156,397.30. The net cost on June 10, 1914, of the lands and timber owned by the A. H. Stange Company on that date, prior to said transfers, was $236,351.41. Including the appreciation item the book value was $1,036,351.41. The book value of the other assets transferred to the Union Land Company on June 10, 1914, as aforesaid was as follows:

General logging equipment	$15,944.13
Camp No. 2	1,371.61
Camp Pellegrin	6,000.00
Cash	60,000.00

VII

Immediately after the transfer of assets by the A. H. Stange Company to the Union Land Company, as above stated, the property so transferred was appraised and entered on the books of the Union Land Company at a value of $3,431,382.61. The lands so transferred consisting of cut-over lands and timberlands had been acquired by the A. H. Stange Company between the date of its organization in 1895 and the date of said transfer, June 10, 1914.

Thereafter, and prior to September 9, 1921, the Union Land Company submitted to the Bureau of Internal Revenue an answered questionnaire relating to the value of said timber and timbered lands as of June 10, 1914, wherein it was stated that the fair market value on June 10, 1914, of said landed properties was not less than $4,512,137.95. Upon consideration of the information contained in said [fol. 23] answered questionnaire, engineers of the Bureau of Internal Revenue, under date of September 9, 1921, approved a value of said landed properties of $4,129,968.81. Upon the basis of these various valuations of said timber and timbered lands, the fair market value on June 10, 1914, of the total amount in cash and property transferred by the A. H. Stange Company to the Union Land Company on that date was as follows:

Value set up on the books of the Union Land Company June 10, 1914	$3,491,382.61
Value claimed in questionnaire	4,572,137.95
Value approved by engineers of the Bureau of Internal Revenue September 9, 1921	4,189,968.81

The property so transferred by the A. H. Stange Company to the Kinzel Lumber Company on June 10, 1914, pursuant to the resolution above quoted, consisted of $300,000 in cash and notes receivable and one piece of real estate having a fair market value of $5,000, such real estate not having been carried upon the books of the A. H. Stange Company, making a total value of property transferred to the Kinzel Lumber Company of $305,000.

VIII

On July 1, 1914, the Union Land Company issued to plaintiff and its other stockholders noninterest-bearing debenture notes, which notes were issued by said company to its stockholders in proportion to their stockholdings, in the aggregate amount of $3,185,000; and on the same day the said Kinzel Lumber Company likewise issued to plaintiff and the other stockholders, also in proportion to their stockholdings, debenture notes in the amount of $140,000.

IX

The account of plaintiff on the books of the Union Land Company shows the following:

That on June 13, 1914, he, plaintiff, was credited with $497,000, representing his proportionate share of the appraised value of the assets transferred to the Union Land Company by the A. H. Stange Company as described above; that on the same date he withdrew $5,000 in cash which was debited to this account; that on the same date there was issued to him capital stock of the Union Land Company of the total par value of $35,000, which was also debited to this account; that on June 16, 1914, he withdrew cash in the further sum of $2,000 which was debited to his account, and that on July 23, 1914, there was issued to him debenture notes as above described in the sum of $455,000, which sum extinguished the balance standing to his credit in this account.

The account of plaintiff on the books of the Kinzel Lumber Company shows the following:

That on June 2, 1914, he, plaintiff, was credited with $45,000, representing his proportionate share of the value of the assets transferred to the Kinzel Lumber Company

by the A. H. Stange Company as described above; that on the same date there was issued to him capital stock of the Kinzel Lumber Company of the par value of $15,000 which was debited to this account; that on June 11, 1914, he withdrew cash in the sum of $10,000, this amount also being debited to this account; and that on July 15, 1914, there [fol. 24] was issued to him debenture notes as above described in the sum of $20,000, which sum extinguished the balance standing to his credit in this account.

The debenture notes of the Union Land Company and the Kinzel Lumber Company, respectively, above described, were authorized to be issued by resolutions adopted by the officers and directors of these two companies at corporate meetings held on the 27th day of June, 1914.

X

The conveyances referred to in the foregoing findings were made on June 10, 1914, by the A. H. Stange Company directly to the Union Land Company and the Kinzel Lumber Company without any intermediate transfer made through or to any of the stockholders of said companies. The evidence does not show any contract or agreement for these transfers, but the circumstances in relation to the transfer of property from the A. H. Stange Company to the other two corporations named show that the transfer thereof and the subsequent proceedings recited in the findings with relation to the Union Land Company and the Kinzel Lumber Company, their stocks, stockholders, entries on their books, cash disbursements, issue of debenture notes, and other matters pertaining thereto were made by mutual consent without formal contract by reason of family relationship and were all part of one transaction which resulted in the distribution of a part of the surplus of the A. H. Stange Company in the manner shown in the foregoing findings.

XI

On or about November 14, 1922, plaintiff executed and filed with the Bureau of Internal Revenue, a written waiver, which was approved and accepted in writing by the Commissioner of Internal Revenue on or about March

16, 1923, which instrument is in words and figures as follows:

"C. H. Stange, of Merrill, Wisconsin, in consideration of the assurance given him by officials of the Income Tax Unit of the Bureau of Internal Revenue that his liability for all Federal taxes imposed by the act of Congress approved October 3, 1913, and also by the act of Congress approved September 8, 1916, as amended by the act of Congress approved October 3, 1917, on his net income received from all sources in the year ended December 31, 1914, and in the year ended December 31, 1917, respectively, shall not be determined except after deliberate, intensive, and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above-named individual does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against him for the said years by the officials of the Income Tax Unit.

"(S.) C. H. Stange.

"(Stamp:) Approved March 16, 1923.

(S.) D. H. Blair, Commissioner of Internal Revenue."

"Merrill, Wisconsin, November 10, 1922."

[fol. 25] XII

The distributions of stock and debenture notes as described above were never returned as taxable income by plaintiff. The Commissioner of Internal Revenue determined the value of all assets transferred, as above stated, by the A. H. Stange Company to the Union Land Company on June 10, 1914, to be $4,189,968.81. The Commissioner of Internal Revenue also determined the value of the assets transferred by the A. H. Stange Company on the same date to the Kinzel Lumber Company to be $305,000, thus making an aggregate value of all assets so transferred to both new corporations, of $4,494,968.81. The Commissioner of Internal Revenue then divided this aggregate sum by seven and determined that the quotient ($642,138.40) was additional taxable income received by plaintiff in 1914 and in

February, 1924, assessed additional income tax thereon against the plaintiff for 1914 in the sum of $28,992.55, which together with interest in the amount of $1,787.21 the plaintiff paid on March 19, 1925.

XIII

On or about March 30, 1926, plaintiff presented to the commissioner a claim for the refunding of $30,779.76 assessed and collected as stated in the preceding finding on the ground that no taxable dividend to the plaintiff resulted from the transactions set forth in Findings II to X inclusive. On June 8, 1927, the plaintiff presented to the commissioner a supplemental claim for refund covering the same payment of taxes and based on the ground that the bar of the statute of limitations had run against the collection of said taxes long prior to the time when the payment thereof was demanded and made by plaintiff. The claim for refund first made was formally rejected May 26, 1926. No action was taken on the supplemental claim for refund presented June 8, 1927.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover and his petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

This case involves taxes for the calendar year of 1914 assessed under the revenue act of 1913, and for which an income-tax return was filed by the plaintiff on February 19, 1915. The other facts material to the decision may be summarized as follows:

A. H. Stange, father of plaintiff, prior to March 24, 1914, was the owner of 1,780 shares of the 2,500 shares of the

stock in the A. H. Stange Company, a corporation, the re-
[fol. 26] mainder of this stock being held by his sons and daughters, or daughters and sons-in-law. On March 24, 1914, A. H. Stange organized a corporation known as the Union Land Company and on May 29, 1914, another corporation known as the Kinzel Lumber Company. On the last-named date the 2,500 shares of the capital stock of the A. H. Stange Company were reapportioned between Mr. Stange and his children in such manner as to give Mr. Stange and each of his sons and daughters (or daughters and sons-in-law) one-seventh of the said 2,500 shares. Prior to the reapportionment the plaintiff owned 120 shares in said company and after it was made, 357.

On June 10, 1914, pursuant to a resolution adopted by the board of directors, the A. H. Stange Company transferred to the Union Land Company cash in the amount of $60,000 and other property having a book value of $1,059,667.15, or a total of $1,119,667.15, and also in the same manner to the Kinzel Lumber Company cash and bills receivable in the total amount of $300,000 and a parcel of real estate valued on the books at $5,000. When these assets were transferred to the two companies the surplus account of the Stange Company was debited with the value of said assets. The Union Land Company entered on its books the assets so transferred to it at a total valuation of $3,491,-382.61, and the Kinzel Lumber Company in the same manner entered on its books the assets which it received in the total sum of $305,000.

The assets conveyed to the two companies were credited to the individual stockholders thereof in proportion to their respective interest in the A. H. Stange Company as shown by their stockholdings. In this manner the plaintiff was credited with $45,000 on the books of the Kinzel Lumber Company on June 2, 1914, and $497,000 on the books of the Union Land Company on June 13, 1914. At the last-named date the plaintiff withdrew from the Union Land Company $5,000 in cash which was charged to his account and the company issued to him capital stock of a par value of $35,000 which was also charged to his account. On June 16, he withdrew the further cash sum of $2,000 and on July 23, 1914, the company issued to him debenture notes in the sum of $455,000, both of which items were debited to his account. The total of all these debits balanced and

extinguished the original credit of $497,000 in the plaintiff's account. In the same manner plaintiff's credit account with the Kinzel Lumber Company was balanced by issuing to him stock of the par value of $15,000, cash $10,000, and debenture notes $20,000.

On November 14, 1922, the plaintiff executed and filed with the Bureau of Internal Revenue a written waiver of statutory limitations approved and accepted by the commissioner as set forth in Finding XI. The Commissioner of Internal Revenue determined that the total value of all assets transferred by the Stange Company to the Union Land Company and the Kinzel Lumber Company to be $4,494,968.81 and allocated one-seventh of this value ($642,-138.40) as taxable income to the plaintiff for the year 1914, and thereon in February, 1924, made an additional assessment of income taxes for 1914, which together with interest amounted to $30,779.76, which the plaintiff paid under protest on March 19, 1925. Thereafter on March 30, 1926, and on June 8, 1927, the plaintiff submitted to the Commissioner [fol. 27] of Internal Revenue a claim for refund and a supplement thereto. These claims for refund give rise to the following objections which the plaintiff makes to the validity of the tax assessed:

(1st) That the transaction involved constituted the distribution of the assets of the A. H. Stange Company and was not a taxable dividend.

(2d) That the waiver of the statute of limitations was confined merely to the assessment of the tax and did not waive the bar of the statute as to the collection thereof, and was executed after the expiration of the period of limitations.

(3d) That in any event plaintiff's taxable income as a result of the transactions involved could have been no greater than the amount credited to him on he books of the transferee companies, being a total of $542,000 instead of the amount of $642,138.40.

(4th) That the several acts of A. H. Stange and the corporations controlled by him herein involved were merely steps taken at the direction of the said A. H. Stange to effectuate a gift to his son, the plaintiff herein, and for that purpose constituted one transaction, and that the property

received by plaintiff was a nontaxable gift from father to son to the extent of 237/357 thereof.

We will first consider the claim of the plaintiff that the stock, cash, and debentures received by him, as above set forth, constituted a distribution in partial liquidation of the assets of the A. H. Stange Company.

It seems to be conceded in argument by both parties that the various acts by which certain property of the A. H. Stange Company was transformed into cash, debenture notes, and stock in the Union Land Company and the Kinzel Lumber Company constituted in reality one transaction and the findings of fact so state. Plaintiff contends that this was a distribution in partial liquidation of the assets of the Stange Company. The 1928 revenue act defines "amounts distributed in partial liquidation" as,

"A distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

A regulation to this effect had been in force for sometime prior to the passage of the last-named act and the part of the act which we have quoted, as we think, was merely the adoption in the statute of a principle of accounting already well settled. At all events we think the instant case is controlled in this respect by the case of Rockefeller v. United States, 257 U. S. 176, an exactly parallel case with the one at bar. In the Rockefeller case a corporation engaged in producing, buying, and selling crude petroleum and transporting it through its pipe lines formed a new corporation to which the pipe-line property was conveyed. In consideration for this conveyance and as a part of the transaction, the new corporation issued all of its capital stock to the stockholders of the old corporation pro rata. The old company remained in business and retained sufficient assets to cover its capital obligations, and the transfer of assets to the new corporation did not result in a reduction of its outstanding stock. The slight difference in the nature of [fol. 28] the facts between that case and the one at bar is immaterial to the legal questions involved. It appeared in the Rockefeller case, supra, that the stock of the new corporation was a consideration for the conveyance. In the

instant case the record is silent on the subject of consideration except as maybe inferred from the facts. The whole transaction was a family matter carried out in pursuance of a plan of A. H. Stange, the father, as a result of which certain property of the A. H. Stange Company passed to the two other corporations and the plaintiff received in lieu of the interest which he possessed therein as a stock holder of the A. H. Stange Company, cash, debenture notes, and stock of the new corporations. That it was a distribution of a part of the surplus of the A. H. Stange Company is quite clear. In fact this is conceded in argument by the plaintiff, but plaintiff says that the distribution was not in the way of a dividend but in partial liquidation. The fact is that there was no cancellation or redemption of any part of the stock of the A. H. Stange Company. We think this was necessary to sustain the claim that there was partial liquidation and in this we are sustained by the decision in the Rockefeller case wherein a practically similar transaction was held to be a dividend. In that case the court said:

"We deem it to be too plain for dispute that * * * the new pipe line company shares were in substance and effect distributed by the oil company to its stockholders; * * * in effect a dividend out of the accumulated surplus."

In the case at bar, after transfers were made by the A. H. Stange Company it still had a surplus of $362,560.78.

In Lynch v. Hornby, 247 U. S. 339, it was held that the 1913 revenue act imposed a tax upon—

"* * * all dividends declared and paid in the ordinary course of business by a corporation to its stockholders after the taking effect of the act (March 1, 1913), whether from current earnings, or from the accumulated surplus made up of past earnings or increase in value of corporate assets, notwithstanding it accrued to the corporation in whole or in part prior to March 1, 1913,"

and a distinction is drawn between this case and the case of Lynch v. Turrish, 247 U. S. 221, relied upon by plaintiff's counsel. It follows that if we are correct in holding the distribution to be in effect a dividend, it was taxable under the 1913 act notwithstanding the distribution was of the

accumulated surplus made up of past earnings or increase in the value of corporate assets.

We have hereinabove referred to the acts which resulted in the distribution of certain of the surplus of the A. H. Stange Company among the children of A. H. Stange, as one transaction. The plaintiff insists that beginning with the redistribution of the stock of the A. H. Stange Company whereby the children and children-in-law of A. H. Stange received more stock than they had heretofore held, there was only one transaction. We do not consider this material. What we are here concerned with is the distribution of the surplus of the A. H. Stange Company to its stockholders. The gift from A. H. Stange to his children was not taxable. The distribution of the surplus of the A. H. Stange Company to its stockholders was taxable whether it was only part of some inclusive transaction or not. There seems to have been some confusion of thought on this point. What we are holding was subject to a tax is [fol. 29] not a gift but the distribution of property by a corporation. A. H. Stange was merely a stockholder in the A. H. Stange Company. He could not give away any of the property of this company or distribute it in any manner. That had to be done by an act of the corporation itself, and the fact that A. H. Stange practically controlled the corporation's acts does not alter the legal effect.

It is also contended by plaintiff that the only amount that is taxable is the credit which was given the plaintiff on the books of the new companies, but what the plaintiff got in the distribution was stock, cash, and debenture notes. So far as the value of the property of the A. H. Stange Company which was distributed is concerned, there is no question but that the commissioner put a moderate valuation thereon. All of this property so distributed went to the new companies and plaintiff and the other heirs held the same proportionate interest therein through stock that they held in the A. H. Stange Company. It is quite evident that it was intended by the several transactions to so distribute the property that each of the heirs would receive his proportionate value of the property received by the new companies. Whether we place the calculation of the dividend upon the value of the property conveyed to the new companies or whether we place it upon the value of

the stock, cash, and debenture notes received, the result is the same for there is no proof that the combined value of what was received by the plaintiff in the end was not equal to the value of his interest in the property conveyed. Indeed the nature of the transaction indicates that it was.

The plaintiff's argument that the collection of the tax was barred by the statute of limitations is based on the claim that the waiver signed by plaintiff and the Commissioner of Internal Revenue was invalid because made after the expiration of the statutory period; and because by the terms thereof it was confined to the assessment of the tax, whereas the statute required the commissioner and taxpayer to "consent in writing to a later determination, assessment, and collection of the tax." The latter objection will be first considered.

The ordinary meaning of the word "assess," when used in connection with matters of taxation, is to fix the amount to be paid by the taxpayer. An assessment can only be made if the taxpayer is liable for the tax, and if liable for the payment of the tax it follows that it was collectible. In other words, a prerequisite of the right to assess is the right to collect the tax when assessed. It would seem, therefore, that an agreement for an assessment was based upon the understanding that the tax was collectible if assessed. However this may be, we think that a waiver of the statute of limitations is a contract, and that even if the statute has run, the moral obligation to pay a tax properly imposed is sufficient to constitute a consideration. The waiver in the case at bar, which is set out in Finding XI, set out a special consideration under which the commissioner agreed to exercise "deliberate, intensive, and thorough consideration" of the liability of plaintiff for the taxes which were to be assessed. Possibly this was the commissioner's duty in any event, and it might also be said that the statutes give him no authority to make a special agreement of this kind; but there was, as we have already seen, a consideration for the waiver and an understanding, as there always is when waivers are executed, that further time will be taken for the consideration of the taxpayer's claims. In construing the waiver, the rules with reference to the con- [fol. 30] struction of contracts should be applied. If the

waiver did not authorize the collection of the tax, its execution was an idle performance—it was nothing but a useless scrap of paper. Whether plaintiff so intended or not, he and his attorneys must have known that the commissioner accepted the waiver believing that it authorized the collection of any tax properly assessed. In such case, the rule with reference to contracts is—

"The language of a contract in case of ambiguity should be interpreted in the sense that the promisor knew or had reason to know that the promisee understood it." (13 C. J. sec. 484 c., page 523, and cases cited, page 526.)

It should be said also that the words "assess" and "assessment," when used with reference to taxes, often include the collection thereof as a necessary sequence. In fact the term "assess" is used at times to include all the steps involved in imposing a tax on property (Allen v. McKay, 120 Cal. 332), and "to assess" often means to levy a tax (see cases cited under note 76, C. J. 813), the two words being used with practically the same meaning, Idem, 76 (b), and the words "to levy" always include the collection of a tax. The same rule applies to the word "assessment," and the parties evidently intended that the word "assessment" should also cover the collection of the tax.

For the reasons stated above we think that the waiver removed the bar of the statute of limitations not only as to assessment but as to collection of the tax.

It is further insisted that the statute providing for waivers had no application to waivers executed after the running of the statute of limitations, and the case of Joy Floral Co. v. Commissioner, 29 Fed. (2d) 865, overruling 7 B. T. A. 800, is cited as so holding. In the case at bar the tax was assessed under section 250 (d) of the revenue act of 1921, which provided that as to taxes due for any prior year, they "shall be determined and assessed within five years after the return was filed, unless both the commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The Joy Floral Co. case, supra, discusses similar provisions contained in section 278 of the revenue act of 1924, under which the assessment was made in that case, and section 276 of

the revenue act of 1928. In the two last-named sections the words "have consented" are used instead of the word "consent" in section 250 (d) of the act of 1921. We do not think the difference is material for reasons hereinafter given, but the Joy Floral Co. case holds that the commissioner had no authority to enter into an agreement with the taxpayer for a waiver of the statute of limitations after the expiration of its limitation. The argument made in support of this decision is that the commissioner's signature, after the statute of limitations had run, was unimportant. This statement loses its force when it is considered that it is just as important at that period as it would have been before the limitation had run. In the absence of a statutory provision either before or after the running of the statute of limitations, the taxpayer could by a mere oral statement waive the running of the statute. Even after the running of the statute, the moral obligation to pay any taxes that were properly levied would be a sufficient consideration for the waiver. The reason for having the commissioner sign the waiver had, in our opinion, nothing to do with its validity. The [fol. 31] purpose of the statutory provision was to do away with the uncertainties of oral agreements. An oral statement on the part of the taxpayer would be subject to dispute and controversy as to its form and meaning, but Congress made it clear and definite that the taxpayer should not be bound unless written evidence of such waiver could be produced. On the part of the Government, it was always understood, if not by implication agreed, that the execution of these waivers would stay proceedings for the collection of the tax until the Government could properly consider the claims of the taxpayer. Congress did not intend that the Government should be bound in any way by the acceptance of waivers made by numerous collectors and revenue agents scattered all over the country but only in case the agreement was signed by the Commissioner of Internal Revenue. It was necessary for the orderly conduct of the Government's business that the commissioner should have full knowledge of the action taken. In this we find abundant reason for the requirement of the signature of the officer and, as we think, the only reason why it was required. To hold that the statute requires the commis-

sioner to consent to the waiver before the expiration of the period of limitation is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress.

In the same case of the Joy Floral Co., supra, much stress was laid upon the fact that in the revenue acts of 1924 and 1928 the statute provided in effect that the waiver would only be effectual where both the commissioner and the taxpayer "have consented" thereto in writing, and it is said the provisions just mentioned should be considered as interpretive of the language used in the 1921 act. It appears to have been thought that the use of the word "have" before the word "consented" implied that this action must have been taken before the expiration of the period of limitation. If Congress had intended that the waiver must be executed before the period of limitations had expired, we think it would have said so. But it did not and we see no justification for this construction which we think is neither grammatical nor logical. Whether the word "consent" is used alone, as it was in the 1921 Act, or words "have consented" are used as in the 1924 and 1928 acts, is immaterial. If a prior "consent" is required, then the parties must "have consented." The latter expressions are merely a paraphrase. In any event the parties must "have consented" to the waiver prior to the time of the collection of the tax and the words in the later statutes merely express the natural sequence of the two events. This is true even though the 1921 act be construed literally and strictly. In our opinion the decision of the Board of Tax Appeals is supported by the better reasoning, and the objections of the plaintiff to the validity of the waiver must be overruled.

From what we have stated above, it follows that the plaintiff's petition must be dismissed and it is so ordered.

Booth, Chief Justice, concurs.

Graham, Judge, concurs in the findings and the result.

[fol. 32]

VI. Judgment

At a Court of Claims held in the City of Washington on the 4th day of November, A. D., 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this court, the amount thereof to be ascertained by the clerk and collected by him according to law. No printing having been done by the court, no costs are taxed.

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,685. Court of Claims. Term No. 554. Charles H. Stange, petitioner, vs. the United States. Petition for writ of certiorari and exhibit thereto. Filed January 3, 1930. File No. 34,685.